

# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921. 1922

No. 182

EMIL POHL, PLAINTIFF IN ERROR,

vs.

THE STATE OF OHIO.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

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FILED OCTOBER 1, 1921.

(28,517)

(28,517)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 562.

EMIL POHL, PLAINTIFF IN ERROR,

*vs.*

THE STATE OF OHIO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

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1 Supreme Court of Ohio.

No. 16492.

EMIL POHL, Plaintiff in Error,

vs.

THE STATE OF OHIO, Defendant in Error.

Error to the Court of Appeals, Cuyahoga County, Ohio.

RECORD.

Harry F. Wittenbrink,  
Geo. B. Okey,  
Timothy S. Hogan,  
Attorneys for Plaintiff in Error.

John G. Price,  
Attorney-General,  
Attorney for Defendant in Error.

Filed Jan. 21, 1920. Supreme Court of Ohio. W. C. Lawrence,  
Clerk.

2 Supreme Court of Ohio.

No. 16492.

EMIL POHL, Plaintiff in Error,

vs.

THE STATE OF OHIO, Defendant in Error.

*Petition in Error.*

[Filed January 8, 1920.]

Plaintiff in error says that on the 8th day of September, 1919, by the judgment of the Mayor's Police Court of the village of Garfield Heights, county of Cuyahoga and state of Ohio, he was found guilty by said court, and fined \$25.00 and costs, for a violation of the act of the General Assembly of the state of Ohio, entitled "An act to supplement section 7762 of the general code, by the addition of supplemental sections 7762-1, 7762-2, 7762-3 and 7762-4, and to repeal section 7729, concerning elementary private and parochial schools and providing that instruction shall be in the English language," passed May 8, 1919, approved June 5, 1919; that a demurrer was interposed to the affidavit filed against him in said court, which was overruled; that motions were made by him

in said court in arrest of judgment and for a new trial were overruled; that error was prosecuted in the Common Pleas Court of Cuyahoga county, Ohio, where the judgment of said Mayor's Police Court was affirmed, and the petition in error was dismissed; that error was prosecuted in the Court of Appeals of Cuyahoga county, Ohio, where the judgment of the Common Pleas and Mayor's Police Court were, on the 7th day of November, 1919, affirmed.

A duly certified transcript of the final record in said Mayor's Police Court, a transcript of the docket and journal entries of said Court of Common Pleas and of said Court of Appeals, together with the original papers filed in said case, are filed herewith and made a part of this petition in error.

There is error in said records and proceedings, in this, to-wit:

1. The said Mayor's Police Court erred in overruling the demurer of this plaintiff in error to the affidavit filed against him, and in upholding the constitutional validity of said act of the general assembly.

2. The said Mayor's Police Court erred in overruling the motion of this plaintiff in error in arrest of judgment.

3. The said Mayor's Police Court erred in overruling the motion of this plaintiff in error for a new trial.

4. The said Mayor's Police Court erred in finding the defendant therein guilty.

5. The Common Pleas Court of Cuyahoga county, Ohio, erred in affirming the judgment of said Mayor's Police Court and in  
4 dismissing the petition in error of this plaintiff in error.

6. The Court of Appeals of Cuyahoga county, Ohio, erred in affirming the judgment of the Common Pleas Court of Cuyahoga county, Ohio, and the judgment of the Mayor's Police Court of Garfield Heights, Ohio, and in dismissing the petition in error of this plaintiff in error.

Plaintiff in error therefore prays that said judgments be reversed and that he be restored to all things he has lost by reason thereof.

HARRY F. WITTENBRINK,

GEO. B. OKEY,

TIMOTHY S. HOGAN,

*Attorneys for Plaintiff in Error.*

*Waiver.*

The defendant in error hereby waives the issuance and service of summons in error in this proceeding and hereby enters its appearance herein.

JOHN G. PRICE,

*Attorney-General,*

*Attorney for Defendant in Error.*

5 In the Court of Appeals, Cuyahoga County, Ohio.

[No. 2827.]

EMIL POHL, Plaintiff in Error,

vs.

THE STATE OF OHIO, Defendant in Error.

*Transcript of Docket and Journal Entries.*

1919, October 1.—Petition in error, waiver of process, transcript and original papers from Common Pleas filed.

1919, October 10.—Motion by plaintiff in error to advance case, with notice of motion filed.

1919, October 18.—Brief of plaintiff in error, with two copies filed.

1919, October 17.—*To Court*: The motion to advance this case is heard and granted. Jour. 4, pg. 4.

November 7, 1919.—*To Court*: This cause came on to be heard upon the pleadings and the transcript of the record in the Court of Common Pleas, and was argued by counsel; and on consideration of all the assigned errors, the court being of the opinion that substantial justice has been done the party complaining, the judgment of the said Court of Common Pleas is affirmed. It is therefore considered that said defendant in error recover of said plaintiff in error its costs herein. Ordered that a special mandate be sent to the Court of Common Pleas, to carry this judgment into execution. The plaintiff in error excepts. Jour. 4, pg. 18.

[Duly certified.]

*Petition in Error.*

[Filed October 1, 1919.]

The plaintiff in error says that on the 8th day of September, A. D. 1919, in the Mayor's Police Court of the village of Garfield Heights, county of Cuyahoga and State of Ohio, in a case then pending therein, wherein the State of Ohio was plaintiff, and he, the plaintiff in error, was defendant, a judgment was rendered in favor of said the State of Ohio, and against him, the said Emil Pohl.

The plaintiff in error further says that he duly prosecuted a proceeding in error in the Court of Common Pleas of said county of Cuyahoga to reverse said judgment of the said Mayor's Police Court of Garfield Heights, Ohio, but that on the 27th day of September A. D. 1919, said Court of Common Pleas affirmed the same.

A duly certified transcript of the final record in said Mayor's Police Court, together with the bill of exceptions taken in said court, and a duly certified transcript of the docket and the journal entries of said Court of Common Pleas, together with the original papers

filed in that court, are filed herewith and made a part of this petition in error.

The plaintiff in error avers that in said judgments and proceedings in said Mayor's Police Court and Court of Common Pleas there is manifest error, to his prejudice, to-wit:

1. The said Mayor's Police Court erred in overruling the demurrer of said Emil Pohl to the affidavit and information.

2. The said Mayor's Police Court erred in overruling the motion of the said Emil Pohl to arrest the judgment in said case.

3. The said Mayor's Police Court erred in overruling the motion of said Emil Pohl for a new trial.

4. The said Mayor's Police Court erred in imposing sentence and rendering judgment against said Emil Pohl.

5. The said Common Pleas Court erred in affirming the judgment of said Mayor's Police Court.

6. The said Court of Common Pleas erred in refusing to reverse said judgment of said Mayor's Police Court.

7. Other errors apparent on the record.

Wherefore the plaintiff in error prays that the said findings and judgments of said Mayor's Police Court and said Court of Common Pleas may be reversed, and that the court make such other order as may be right in the premises.

GEORGE B. OKEY,  
HARRY WITTENBRINK,  
*Attorneys for Plaintiff in Error.*

*Waiver.*

The defendant in error hereby waives the issuance and service of summons in error in this proceeding and hereby enters its appearance herein.

SAMUEL DOERFLER,  
*Attorney for Defendant in Error.*

8 In the Court of Common Pleas, Cuyahoga County, Ohio.

[No. 17055.]

EMIL POHL, Plaintiff in Error,  
vs.

THE STATE OF OHIO, Defendant in Error.

*Transcript of Docket and Journal Entries.*

1919, September 9.—Transcript and original papers from Joe Schmidt, police justice of Garfield Heights.

1919, September 9.—*To Court*: Leave is hereby granted the plaintiff in error to file a petition in error. Jour. 29, p. 18.

1919, September 9.—Petition in error and waiver of summons filed.

1919, September 27.—*To Court*: This cause came on for hearing upon the petition in error, the transcript and the original papers and pleadings from the court below, and was argued by counsel; on consideration whereof the court find that there is no error apparent on the record in said proceedings and judgment. Jour. 29, p. 107.

1919, October 1.—*To Court*: Appeal bond in this case is fixed in the sum of \$200. This day comes the plaintiff in error herein and gives recognizance No. 16316 in the sum of \$200 with  
9 Fred Albers as surety. Jour. 29, p. 119.

1919, October 1.—Petition in error filed in Court of Appeals by plaintiff in error.

[Duly certified.]

*Petition in Error.*

[Filed September 9, 1919.]

The plaintiff in error says that:

On the eighth day of September, A. D. 1919, in the Mayor's Police Court of Garfield Heights, Cuyahoga county, Ohio, in a case then pending therein, wherein the State of Ohio was plaintiff, and he, plaintiff in error, was defendant, a judgment was rendered in favor of the said the State of Ohio and against him, the said Emil Pohl.

A duly certified transcript of the final record, together with the bill of exceptions, are filed herewith and made a part of this petition in error.

The plaintiff in error avers that in said judgment and proceedings in said Mayor's Police Court there is manifest error to his prejudice, to wit:

1. The said court erred in overruling the demurrer of said Emil Pohl to the affidavit and information.
2. The said court erred in overruling the motion of said Emil Pohl to arrest the judgment in said case.
3. The said court erred in overruling the motion of said Emil Pohl for a new trial.
4. The said court erred in imposing sentence and rendering judgment against said Emil Pohl.
5. Other errors apparent on the record.

10 Wherefore the plaintiff in error prays that the said finding and judgment of said Mayor's Police Court may be re-

versed, and that the court make such other order as may be right and proper in the premises.

GEO. B. OKEY,  
HARRY F. WITTENBRINK,  
*Attorneys for Plaintiff in Error.*

*Waiver.*

Cleveland, Ohio, September 9, 1919.

The defendant in error hereby waives the issuance and service of summons in error in the foregoing proceeding and hereby enters its appearance herein.

SAMUEL DOERFLER,  
*Attorney for Defendant in Error.*

11 In the Mayor's Police Court, Garfield Heights, Cuyahoga County, Ohio.

[No. 128.]

THE STATE OF OHIO

vs.

EMIL POHL.

*Transcript.*

September 8, 1919.

This day came Henry Weber, who, being first duly sworn according to law, deposes and says: That on or about the eighth day of September, A. D. 1919, at the county of Cuyahoga, and in the village of Garfield Heights in said county, one Emil Pohl, being then and there a teacher in a certain private or parochial school, conducted in the premises known as corner of Granger road and Turney road, in said village of Garfield Heights, did teach the German language to pupils in said school who had not completed a course of study equivalent to that prescribed in the first seven grades of the elementary schools of the State of Ohio, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Ohio.

(Signed)

HENRY WEBER.

Sworn to before me by the said Henry Weber and by him subscribed in my presence this eighth day of September, A. D. 1919.

(Signed)

JOSEPH A. SCHMITT,  
*Police Justice.*

12 Complaint filed.

Warrant issued to Henry Weber, marshal of said village of Garfield Heights, for the defendant, who made return as follows, to wit:

September 8, 1919.

I took the body of the within named Emil Pohl and have him before the magistrate within named.

(Signed)

HENRY WEBER,  
*Marshal.*

September 8, 1919.—Defendant demurred and filed a written demurrer to the information and affidavit. Argued by counsel. Counsel for defendant filed a written brief in support of said demurrer.

To Court: Demurrer overruled.

To which finding, decision and ruling of the court the defendant, by his counsel, then and there excepted. Exceptions noted.

The defendant, Emil Pohl, being now brought before me to answer said complaint, pleaded not guilty, and in a writing subscribed by him and duly filed waived a jury and submitted to be tried for the offense charged in said complaint, by me.

Having heard the evidence the court finds the said Emil Pohl guilty as charged in the affidavit.

September 8, 1919.—Motion in arrest of judgment filed by defendant.

September 8, 1919.—Motion for a new trial filed by the defendant. Both motions argued by counsel for defendant.

September 8, 1919.—To Court: Motion in arrest of judgment and motion for a new trial overruled; exceptions; exceptions noted.

Defendant ordered to pay a fine to the State of Ohio in the sum of \$25 and the costs of this prosecution.

September 8, 1919.—Defendant gave notice of his intention to apply for leave to file a petition in error.

To Court: Ordered that the said defendant be released on his personal recognizance and that execution of this sentence be suspended until further order.

September 8, 1919.—Defendant presented his bill of exceptions.

To Court: Bill of exceptions allowed, signed and sealed by the court and is made a part of the record of this case, but is not to be recorded or spread at large upon the journal.

September 8, 1919.—Bill of exceptions filed.

[Duly certified.]

*Affidavit.*

[Filed September 8, 1919.]

THE STATE OF OHIO,

*Cuyahoga County, ss:*

Before me, Joseph A. Schmitt, justice of the mayor's police court, Garfield Heights Village, personally came Henry Weber, who, being first duly sworn according to law, deposes and says: That on or about the eighth day of September, A. D. 1919, at the county of Cuyahoga and in the village of Garfield Heights in said county, one

Emil Pohl, being then and there a teacher in a certain private (or parochial) school, conducted in the premises known as corner of Granger and Turney road, in said village of Garfield Heights, did teach the German language to pupils in said school who had not completed a course of study equivalent to that prescribed in the first seven grades of the elementary schools of the State of Ohio, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Ohio.

HENRY WEBER.

Sworn to before me by said Henry Weber and by him subscribed in my presence this eighth day of September, A. D. 1919.

JOSEPH A. SCHMITT,  
*Police Justice.*

*Demurrer.*

[Filed September 8, 1919.]

The said Emil Pohl, defendant, demurs to the information and affidavit because the facts stated therein do not constitute an offense against the laws of the State of Ohio.

GEO. B. OKEY,  
HARRY F. WITTENBRINK,  
*Attorneys for Defendant.*

*Motion in Arrest of Judgment.*

[Filed September 8, 1919.]

Now comes the defendant, Emil Pohl, and moves the court to arrest the judgment in this case for the reason that the facts stated in the information and affidavit do not constitute an offense.

GEO. B. OKEY,  
HARRY F. WITTENBRINK,  
*Attorneys for Defendant.*

15

*Motion for New Trial.*

[Filed September 8, 1919.]

The defendant, Emil Pohl, now comes and moves the court for a new trial in this case for the reasons following, to wit:

1. The finding of conviction is contrary to the evidence.
2. The finding of conviction is contrary to law.
3. Other errors apparent on the record.

GEO. B. OKEY,  
HARRY F. WITTENBRINK,  
*Attorneys for Defendant.*

*Bill of Exceptions.*

[Filed September 8, 1919.]

Be it remembered, that on the eighth day of September, A. D. 1919, this cause came on to be heard before Honorable Joseph A. Schmitt, judge of said court, upon the demurrer of the defendant to the information and affidavit. On consideration whereof the court overruled said demurrer, to which ruling the defendant then and there, by his counsel, at the time excepted and still excepts.

Thereupon, on the same day, the case came on for trial, and the jury being waived, counsel representing the state and the defendant, in open court, entered upon the following stipulation and agreed statement of facts:

"It is hereby stipulated and agreed by and between counsel on behalf of the State and the defendant that a jury be waived and that the case be submitted to the court upon the following agreed facts:

"On the eighth day of September, A. D. 1919, Emil Pohl was a teacher in the parochial school, known as St. John's Evangelical Congregational School and located at the corner of Granger road and Turney road, in the village of Garfield Heights, county of Cuyahoga and State of Ohio, and that on said day he, said Emil Pohl, did impart instruction in and did teach the German language to pupils in said parochial school, who had not completed a course of study equivalent to that prescribed in the first seven grades of

the elementary schools of the State of Ohio; and that said parochial school is maintained by the voluntary contributions of the pupils and their parents and others interested in the educational purposes of the Evangelical Lutheran Church, but that said school is free, open and available to all persons, without discrimination or distinction, creed, condition, race or otherwise.

"That the said Saint John's Evangelical Lutheran Congregation school being a parochial school and private school does not receive any part of the public school funds of the State of Ohio."

And there was no other evidence offered, introduced or admitted by either the State or defendant in the trial of this case, the foregoing stipulation and agreed statement of facts being all the evidence given or offered by either side upon the trial.

Whereupon, a jury having been waived by the defendant, the court found the defendant guilty, as charged in the information, as appears of record in the case; and the defendant thereafter, within three days, filed a motion in arrest of judgment and a motion to set aside the said finding, judgment and decision and for a new trial, and the same was argued by counsel and submitted to the court, which, upon consideration, overruled the same, as appears of record.

And the defendant thereupon, at the time, excepted to the ruling of the court in overruling motion in arrest of judgment and for a new trial, and still excepts.

And the court thereupon imposed sentence upon the defendant, as appears of record, to which sentence and judgment the defendant thereupon at the time excepted and still excepts.

The defendant thereupon presented this bill of exceptions and prayed that the same be allowed, signed, sealed and filed as a part of the record in said case, but not spread at large upon the journal, according to the statute in such case made and provided, all of which is accordingly done this eighth day of September, A. D. 1919.

[SEAL.]

JOSEPH A. SCHMITT,

*Police Justice.*

19 UNITED STATES OF AMERICA, ss:

Supreme Court of Ohio.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the Seal of said Supreme Court of Ohio, in the City of Columbus, this 19th day of September, A. D. 1921.

[Seal of the Supreme Court of the State of Ohio.]

W. C. LAWRENCE,

*Clerk of the Supreme Court of Ohio.*

20

16492.

In the Supreme Court of Ohio.

No. 16492.

EMIL POHL, Plaintiff in Error,

vs.

THE STATE OF OHIO, Defendant in Error.

*Petition of Emil Pohl for Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Ohio.*

To the Honorable C. T. Marshall, Chief Justice of the Supreme Court of the State of Ohio:

Emil Pohl, Plaintiff in Error in the above entitled cause, shows by this Petition to this Honorable Court, that in the records, proceedings and decisions in the Supreme Court of the State of Ohio, the same being the highest court of said State in which a decision could be had in this suit, manifest error has occurred, greatly to the damage of said Emil Pohl.

That, as appears in the record and proceedings, there was drawn in question the validity of an Act of the General Assembly of the State of Ohio, passed May 8, 1919, and approved by the Governor, June 5, 1919, entitled:

"An Act

To supplement section 7762 of the General Code by the addition of supplemental sections, to be known as sections 7762-1, 7762-2, 7762-3, and 7762-4, and to repeal section 7729, concerning elementary, private, and parochial schools, and providing that instruction shall be in the English language."

Said Emil Pohl further says that in this cause, on the 7th day of June, 1921, final judgment was rendered against him by the Supreme Court of the State of Ohio, that being the highest court of law in said State of Ohio, wherein it was adjudged that the Court of Appeals of Cuyahoga County, Ohio, did not err in its judgment affirming the judgment of the Court of Common Pleas of Cuyahoga county, Ohio, which latter Court affirmed the judgment of the Mayor's Police Court of Garfield Heights, Cuyahoga county, Ohio, and held that said Mayor's Police Court did not err at the trial of said cause in said court in sustaining the validity of said Act; and said Supreme Court of the State of Ohio therein affirmed the judgment of said Court of Appeals and said lower courts; and in said cause further adjudged that said Act of the General Assembly of the State of Ohio was a valid law, and the conviction of said Emil Pohl thereunder was not repugnant to Section 1 of Art. XIV, being the Fourteenth Amendment to the Constitution of the United States, which ordains:

\* \* \* "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

All of which, to the prejudice of said Emil Pohl fully appears in the records and proceedings of the case and is specifically set forth in the assignment of errors filed herewith.

Wherefore your petitioner prays for an allowance of a Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Ohio and the Judges thereof, to the end that the record in this case may be removed into the Supreme Court of the United States and the errors complained of by your petitioner may be examined and corrected and said judgment reversed, and said cause remanded, as provided by law; and that your petitioner may have such other and further relief in the premises as may be adjudged; and your petitioner will ever pray.

(Signed)

EMIL POHL,

By TIMOTHY S. HOGAN AND  
GEO. B. OKEY,

*His Attorneys.*

The Writ of Error as prayed in the foregoing Petition is hereby allowed this 29th day of August, 1921.

Dated at the City of Columbus, Ohio, this 29<sup>th</sup> day of August, 1921.

C. T. MARSHALL,  
*Chief Justice of the Supreme Court  
of the State of Ohio.*

21½ [Endorsed:] 16492. Filed Aug. 29, 1921. Supreme Court of Ohio. W. C. Lawrence, Clerk.

22 In the Supreme Court of Ohio.

No. 16492.

EMIL POHL, Plaintiff in Error,

vs.

THE STATE OF OHIO, Defendant in Error.

*Order Allowing Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Ohio.*

On this 29th day of August, 1921, the application of Emil Pohl, Plaintiff in Error and the State of Ohio, Defendant in Error, for a Writ of Error, came on to be heard, and it appearing to the Court from the Petition filed herein and from the record and the proceedings filed therewith that said application should be granted, and that a transcript of the record, proceedings and papers, upon which the judgment of the Court was rendered, properly certified, should be sent to the Supreme Court of the United States in accordance with the prayer of said Petition in order that such proceedings may be had as may be just and proper:

Now, therefore, it is ordered that the Writ of Error be allowed, and that a true copy of the record, Assignment of Errors, and all proceedings in the case of the Supreme Court of the State of Ohio shall be transmitted to the Supreme Court of the United States duly certified according to law, in order that said Court may inspect the same and take such action therein as it deems proper according to law.

C. T. MARSHALL,  
*Chief Justice of the Supreme Court  
of the State of Ohio.*

Journal 28, page 694.

22½ [Endorsed:] 16492. Filed Aug. 29, 1921. Supreme Court of Ohio. W. C. Lawrence, Clerk.

23 In the Supreme Court of Ohio.

No. 16492.

EMIL POHL, Plaintiff in Error,

vs.

THE STATE OF OHIO, Defendant in Error.

*Assignment of Errors on Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Ohio.*

Now comes Emil Pohl in connection with his petition for a Writ of Error herein, and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Ohio in the above entitled case, there is manifest error in this to-wit:

First. The Supreme Court of the State of Ohio erred in affirming the judgment of the Court of Appeals of Cuyahoga county, Ohio, and in refusing to reverse said judgment and remand the cause to the Court of Appeals of Cuyahoga county, Ohio, for further proceedings.

Second. The Supreme Court of the State of Ohio should have found that said Court of Appeals of Cuyahoga county, Ohio, erred in affirming the judgment of the Court of Common Pleas of Cuyahoga county, Ohio, affirming the judgment of the Mayor's Police Court of Garfield Heights, Cuyahoga county, Ohio, convicting said Emil Pohl with having violated an Act of the General Assembly of the State of Ohio passed May 8, 1919, approved June 5, 1919, entitled:

"An Act

24 To supplement section 7762 of the General Code by the addition of supplemental sections, to be known as sections 7762-1, 7762-2, 7762-3, and 7762-4, and to repeal section 7729, concerning elementary, private, and parochial schools, and providing that instruction shall be in the English language."

Third. The judgment of the said Supreme Court of Ohio was given for said State of Ohio when it should have been given in favor of said Emil Pohl.

Fourth. The judgment of the Supreme Court of the State of Ohio, in this case, is in contravention of Section 1 of Art. XIV, being the Fourteenth Amendment to the Constitution of the United States, which declares:

\* \* \* "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Fifth. The Supreme Court of the State of Ohio erred in holding that the Act of the General Assembly of the State of Ohio passed May 8, 1919, approved June 5, 1919, entitled:

"An Act

To supplement section 7762 of the General Code by the addition of supplemental sections, to be known as sections 7762-1, 7762-2, 7762-3, and 7762-4, and to repeal section 7729, concerning elementary, private, and parochial schools, and providing that instruction shall be in the English language,"

was not in contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States, notwithstanding said Act, and the conviction of said Emil Pohl thereunder, assumes to deprive and to deny to said Emil Pohl the privilege and immunity as a citizen of the United States, and of his liberty as such citizen, without due process of law, to instruct pupils in the German Language, in private and parochial schools, who have not completed a course of study equivalent to that prescribed for the first seven grades of the elementary schools of the State of Ohio.

TIMOTHY S. HOGAN,

GEO. B. OKEY,

*Attorneys for Emil Pohl.*

24½ [Endorsed:] 16492. In the Supreme Court of Ohio.  
Emil Pohl, Plaintiff in error vs. The State of Ohio, Defendant in error. Assignment of errors. Filed Aug. 29 1921.  
Supreme Court of Ohio, W. C. Lawrence, Clerk.

25 In the Supreme Court of Ohio.

No. 16492.

EMIL POHL, Plaintiff in Error,

vs.

THE STATE OF OHIO, Defendant in Error.

*Writ of Error from the Supreme Court of the United States to the  
Supreme Court of the State of Ohio.*

THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Ohio, Greeting:

Whereas, in the record and proceedings and in the rendition of the judgment in the above entitled cause which is now before you, or some of you, between Emil Pohl, Plaintiff in Error, and the

State of Ohio, Defendant in Error, your court being the highest court of said State of Ohio having jurisdiction of the cause, there was drawn in question the validity of a statute of the State of Ohio and an authority exercised under said statute, on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity; and whereas there is manifest error in said judgment to the great damage of said Emil Pohl; and whereas we are willing that if there is error it should be duly corrected, we command you therefore, if judgment be given therein, that you send under seal of your court the record and proceedings in said cause to the Supreme Court of the United States together with this Writ, within such time as may be necessary, in order that you may have the same at Washington on the 5th day of 26 October, 1921, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid may be then inspected by the Supreme Court of the United States and that said Supreme Court of the United States may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

(Witness) the Honorable William H. Taft Chief Justice of the Supreme Court of the United States, this 5 day of September, A. D. 1921.

[Seal of the United States District Court, Southern Dis.  
of Ohio.]

B. E. DILLEY,  
*Clerk of the United States District  
Court for the Southern District of  
Ohio, Eastern Division.*

Allowed

C. T. MARSHALL,  
*Chief Justice of the  
Supreme Court of Ohio.*

26½ [Endorsed:] Filed Sep. 5, 1921. Supreme Court of  
Ohio, W. C. Lawrence, Clerk.

27 In the Supreme Court of the United States.

No. 16492.

EMIL POHL, Plaintiff in Error,

vs.

THE STATE OF OHIO, Defendant in Error.

*Citation.*

THE UNITED STATES OF AMERICA, ss:

To Honorable John G. Price, Attorney General of the State of Ohio,  
and to Honorable Edward C. Stanton, Prosecuting Attorney of  
Cuyahoga County, Ohio, Greetings:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the City of Washington in the District of Columbia, on the — day of —, A. D. 1921, pursuant to a Writ of Error filed in the Clerk's office of the Supreme Court of the State of Ohio from a final judgment signed, filed and entered therein on the 7th day of June, 1921, in a proceeding therein pending wherein Emil Pohl is Plaintiff in Error and the State of Ohio is Defendant in Error, to show cause if any there be why the judgment rendered against said Emil Pohl as in said Writ of Error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

C. T. MARSHALL,

*Chief Justice of the Supreme Court  
of the State of Ohio.*

Dated this 29<sup>th</sup> day of August, 1921.

Copy of the above Citation received this 2nd day of September, 1921, at Columbus, Ohio, and the appearance of the State of Ohio is hereby entered.

\_\_\_\_\_  
*Attorney General of the State of Ohio.*

EDWARD C. STANTON,

*Prosecuting Attorney of Cuyahoga County, Ohio.*

27½ [Endorsed:] Filed Sep. 19, 1921, Supreme Court of Ohio.  
W. C. Lawrence, Clerk.

28

In the Supreme Court of the United States.

No. 16492.

EMIL POHL, Plaintiff in Error,

vs.

THE STATE OF OHIO, Defendant in Error.

*Stipulation as to Transcript of Record.*

Columbus, Ohio, August 31st, 1921.

The undersigned counsel for the respective parties in this cause hereby stipulate that the Clerk of the Supreme Court shall make a transcript of, and shall certify and transmit the entire record in this cause, including all pleadings, opinions and proceeding- in this court and a certified copy of the docket and journal entries in this court.

TIMOTHY S. HOGAN,

GEO. B. OKEY,

*Attorneys for Emil Pohl.**Attorney General of Ohio.*

EDWARD C. STANTON,

*Prosecuting Attorney of Cuyahoga County, Ohio.*

EDWARD J. THOBABEN,

*Asst. Pros. Attorney.*

28½

[Endorsed:] Filed Sep. 19, 1921, Supreme Court of Ohio.  
W. C. Lawrence, Clerk.

29

#17492.

Know all men by these presents, That we Emil Pohl, as principal, and Royal Indemnity Co. of New York, as sureties, are held and firmly bound unto The State of Ohio in the full and just sum of two hundred and fifty (\$250.00) dollars, to be paid to the said obligee and its certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 7th day of September, in the year of our Lord one thousand nine hundred and twenty-one.

Whereas, lately at the January, 1921, term of the Supreme Court of the State of Ohio in a suit depending in said court, between Emil Pohl, plaintiff-in-error, and the State of Ohio, Defendant-in-error, a judgment was rendered against the said Emil Pohl, and the said Emil Pohl having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the afore-said suit, and a citation directed to the said Honorable John G. Price, Attorney General of the State of Ohio, and to Honorable Edward C. Stanton, Prosecuting Attorney of Cuyahoga County, Ohio, citing and

admonishing them to be and appear at the Supreme Court of the United States, at Washington, with- — days from the date thereof.

Now, the condition of the above obligation is such, That if the said Emil Pohl shall prosecute his said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

EMIL POHL.	[SEAL.]
ROYAL INDEMNITY CO.	[SEAL.]
L. J. O'DONNELL.	[SEAL.]

Sealed and delivered in presence of  
EDWARD P. HOGAN.  
T. S. HOGAN.

Approved by  
C. T. MARSHALL,  
*Chief Justice of the Supreme Court  
of the State of Ohio.*

29½ [Endorsed:] 17492. Application made Sept. 7th, 1921.  
C. T. Marshall, Chief Justice. Emil Pohl vs. State of Ohio.  
Copy of Bond. Filed Sep. 8, 1921, Supreme Court of Ohio. W. C. Lawrence, Clerk.

30 Supreme Court of the State of Ohio, January Term, A. D.  
1919.

(Minute Book No. 35, Page 292.)

Number: 16492.

Title of Case.

EMIL POHL, Plaintiff in Error,

vs.

THE STATE OF OHIO, Defendant in Error.

Action: Error to the Court of Appeals of Cuyahoga County.

Attorneys: Harry F. Wittenbrink, Cleveland; George B. Okey,  
T. S. Hogan, Columbus, Ohio, for plaintiff in error.

John G. Price, Attorney General, Columbus, Ohio; E. C. Stanton,  
Prosecuting Attorney, R. A. Baskin, F. J. Merrick, Cleveland, Ohio,  
for defendant in error.

*Transcript of Docket Entries, Memoranda of Pleadings, &c., Filed, Writs Issued, Judgments, Orders and Decrees.*

• 1920.

- Jan. 8. Petition in Error and Waiver of Summons filed.  
 " " Court of Appeals transcript, original papers and bill of exceptions filed.  
 " " Papers taken by Toothaker & Rodenfels. 1.29/20—Returned.  
 " 21. Printed Record (12) filed; 1/22/20—Proof of service filed.  
 Mar. 9. Entry for extension of time to file brief, filed.  
 " " \* \* \* Order extending time for Plaintiff's Printed Briefs to May 17, 1920—by consent. H. L. Nichols, C. J.  
     Journal 28, page 392.  
 May 15. Consent entry extending time to file briefs, filed.  
 " " \* \* \* Order extending time for plaintiff's briefs to July 1, 1920. Nichols, C. J.,  
     Journal 28, page 429.  
 Jun. 30. Plaintiff's printed briefs filed. 7/1/20—Proof of service filed.  
 Dec. 17. Defendant's printed briefs filed. 12/20/20—Proof of service filed.

1921.

- Feb. 23. Plaintiff's Printed Reply Briefs filed.  
 Jun. 7. \* \* \* Judgment Affirmed.  
     Journal 28, page 646.  
 Jun. 14. Mandate Issued.  
 " " Original papers sent to Clerk.  
 Aug. 29. Petition for writ of error from Supreme Court of United States to Supreme Court of Ohio, filed.  
 " " Assignment of Errors and an order of allowance by Chief Justice.  
 " " C. T. Marshall, filed.  
 Aug. 29. \* \* \* Order allowing writ of error. C. T. Marshall, C. J.  
     Journal 28, page —.  
 Sep. 5. Writ of Error filed.  
 " " Petition for writ, Assignment of errors and writ of error taken by Hogan and Hogan.  
 " 8. Bond on writ of error with Royal Indemnity Company of New York, as surety, filed.  
 " 19. Stipulation as to transcript of record filed,  
 " " Citation and entry of appearance of defendant filed.

*Transcript of Journal Entries.*

No. 16492.

EMIL POHL

vs.

THE STATE OF OHIO.

1920.

March 9. "On application, the time within which the plaintiff in error is required to file his printed brief or argument herein is hereby extended until the 17th day of May, 1920.

Approved:

HUGH L. NICHOLS,  
*Chief Justice.*"

Journal 28, page 392.

May 18. "On application, the time for filing brief of the plaintiff in error herein is extended to the first day of July, 1920.

Approved:

HUGH L. NICHOLS,  
*Chief Justice.*"

Journal 28, page 429.

1921.

June 7. "This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Cuyahoga County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said Court of Appeals be and the same is hereby affirmed; and it appearing to the Court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein. It is further ordered that the defendant in error recover from the plaintiff in error its costs herein expended, taxed at \$—. Ordered, That a special mandate be sent to the Common Pleas Court of Cuyahoga County, to carry this judgment into execution. Ordered, That a copy of this entry be certified to the Clerk of the Court of Appeals of Cuyahoga County, "for entry."

Journal 28, page 646.

(Nos. 16492 and 16493—Decided June 7, 1921.)

POHL

v.

THE STATE OF OHIO.

BOHNING

v.

THE STATE OF OHIO.

*Constitutional Law—Compulsory Education—Teaching by English Language Only—Sections 7762-1 and 7762-2, General Code—German Language Prohibited, When—Public, Private and Parochial Schools.*

Error to the Court of Appeals of Cuyahoga County.

The plaintiff in error in each of the above entitled causes was convicted and sentenced to pay a fine of twenty-five dollars and costs in the mayor's police court of the village of Garfield Heights, Cuyahoga county, Ohio, Emil Pohl, having been a teacher, and H. H. Bohning, a member of the board of trustees, of a certain parochial school, known as St. John's Evangelical Lutheran Congregational School, in the village of Garfield Heights, it appearing that Pohl did on the 8th day of September, 1919, in said village, impart instructions in and teach the German language to pupils in such school who had not completed a course of study equivalent to that prescribed in the first seven grades of the elementary schools of the state of Ohio, and that Bohning, as a member of the board of trustees of such school, did cause Pohl to impart instruction and teaching as aforesaid, contrary to the provisions of Sections 7762-1, 7762-2 and 7762-3, General Code. Error was prosecuted to the common pleas court, where the judgment of the mayor's court was affirmed; error prosecuted to the court of appeals, where the judgments of the common pleas court and the mayor's court were affirmed; and error prosecuted here to the judgments of the courts below, the only question here made being as to the constitutionality of the sections of the Code above referred to.

Mr. Harry F. Wittenbrink; Mr. George B. Okey and Mr. Timothy S. Hogan, for plaintiffs in error.

33 Mr. John G. Price, attorney general; Mr. R. A. Baskin, prosecuting attorney; and Mr. Frank J. Merrick, assistant prosecuting attorney, for defendant in error.

## By the COURT:

While much consideration in arguments and briefs has been given to the wisdom of the provisions of Sections 7762-1 and 7762-2, General Code, this court is of opinion that such argument might better be addressed to the legislative branch of the government.

Courts do not sit to review the wisdom of legislative acts, nor do they possess such power. On the contrary, the policy, the advisability, and the wisdom of all legislation, subject to the veto of the governor and the referendum of the people, are subjects for legislative determination exclusively. The inexpediency, injustice or impropriety of a legislative act are not grounds upon which the court may declare the act void. The remedy for such evils must be sought by an appeal to the justice and patriotism of the legislature itself.

Except as limited by the Federal and State Constitutions, the power of the general assembly to legislate is inherent and unlimited and covers the whole range of legitimate legislation.

If the general assembly in the exercise of its power to legislate enacts laws necessary for the welfare of society, and thereby makes unlawful conduct theretofore lawful, such legislation will not be held to be unconstitutional simply because it forbids the doing of things theretofore permitted. The enjoying and defending life and liberty and seeking and obtaining happiness do not contemplate that they shall be enjoyed, sought and obtained as they were enjoyed, sought and obtained by primitive man, but that they shall be enjoyed, sought and obtained with such regard to the rights of society as the common welfare, as defined by the legislature, requires. It is upon this theory that our system of government exists.

The legislation in question is of equal application to every pupil of the state who has not completed a course of study equivalent to that prescribed in the first seven grades of the elementary schools, regardless of nationality, ancestry, or place of birth, and is, therefore, of equal operation upon every person within the designated grade.

The constitutionality of the act under consideration is, therefore, dependent upon whether the common welfare required such legislation. The legislature is presumed to have had before it such information with reference to the effect of the teaching of the German language to the youth of the state below the eighth grade as justified it in concluding that the common welfare required the prohibition of such teaching to such youth, and if the legislature found such facts to exist as to warrant it in the enactment of the sections in question it is not within the province of a court to redetermine the existence or nonexistence of such facts, even though the court might upon such redetermination reach a different conclusion. If under any possible state of facts the sections would be constitutional, this court is bound to presume that such facts exist.

No principle is better established by the decisions of the federal and state courts than that the possession and enjoyment of all rights are subject to such reasonable regulations as are deemed by the legislative authority to be essential to the welfare of the state, and

every intendment is to be made in favor of the validity and lawfulness of such regulations unless they are clearly unreasonable and violative of some express provision of the constitution.

For these reasons we are unable to reach the conclusion that Sections 7762-1 and 7762-2 are unconstitutional, and the judgment of the court of appeals will, therefore, be affirmed.

Judgment affirmed.

Marshall, C. J., Johnson, Hough, Wanamaker, Robinson, Jones and Matthias, JJ., concur.

35      STATE OF OHIO,  
            *City of Columbus:*

Supreme Court of the State of Ohio, of the Term of January, A. D., 1921.

I, J. L. W. Henney, Reporter of the Supreme Court of Ohio, do hereby certify that the foregoing transcript, consisting of three (3) pages, constitutes a full, true and correct copy of the per curiam opinion of the Supreme Court of Ohio (concurred in by Marshall, C. J., Johnson, Hough, Wanamaker, Robinson, Jones and Matthias, JJ.), in Cause No. 16492, Pohl v. The State of Ohio, as the originals thereof appear on file and of record in this office, as of the date of this certificate.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 29th day of August, A. D., 1921.

[Seal of the Supreme Court of the State of Ohio.]

J. L. W. HENNEY,  
                            *Reporter.*

[Endorsed:] 16492. Supreme Court of Ohio. Filed Aug. 29, 1921. W. C. Lawrence, Clerk.

36                      *Certificate of Lodgment.*

STATE OF OHIO, ss.:

Supreme Court.

I, Wilbur C. Lawrence, Clerk of the said Court, do hereby certify that there was lodged with me as said Clerk, on the date set forth below, in the case of Emil Pohl, Plaintiff in Error vs. The State of Ohio, Defendant in Error,

1. Two copies of the writ of error, as herein set forth, one for the defendant in error and one to file in my office, the same being lodged with me on August 29th, 1921.

2. The original bond, a copy of which is herein set forth, the same being lodged with me on September 7th, 1921, and presented

to the Chief Justice, Hon. C. T. Marshall on that date, and returned and filed in my office on September 8th, 1921.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court at my office in Columbus, Ohio, this 19th day of September, A. D. 1921.

[Seal of the Supreme Court of the State of Ohio.]

W. C. LAWRENCE,  
*Clerk of the Supreme Court of Ohio.*

37

Supreme Court of the State of Ohio.

No. 16492.

EMIL POHL, Plaintiff in Error,

vs.

THE STATE OF OHIO, Defendant in Error.

*Authentication of Record.*

THE STATE OF OHIO,  
*City of Columbus, ss:*

I, Wilbur C. Lawrence, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing petition for writ of error, assignment of errors, order allowing writ of error, writ of error, citation to defendant and entry of appearance, and stipulation as to transcript of record are the original papers filed in this Court in the above entitled cause; that the foregoing copy of the bond is a true copy of the bond filed in said cause; that the printed copy of the record attached hereto is a true copy of the printed record filed in said cause; that the foregoing transcript of docket and journal entries is truly taken and correctly copied from the Records of said Court, and that a duly certified copy of the opinion of the Supreme Court of Ohio is hereto attached.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court of Ohio this 19th day of September, A. D. 1921.

[Seal of the Supreme Court of the State of Ohio.]

W. C. LAWRENCE,  
*Clerk of the Supreme Court of Ohio.*

Endorsed on cover: File No. 28,517. Ohio Supreme Court. Term No. 562. Emil Pohl, plaintiff in error, vs. The State of Ohio. Filed October 1st, 1921. File No. 28,517.

FILED  
SEP 19 1922

W. S. STANLEY  
CLERK

# United States Supreme Court

H. E. Bohling,  
Plaintiff in Error,  
vs.  
The State of Ohio,  
Defendant in Error.

[No. 181]

Emil Pohl,  
Plaintiff in Error,  
vs.  
The State of Ohio,  
Defendant in Error.

[No. 182]

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR

TIMOTHY S. HOGAN and

FRANK DAVIS JR.

Attorneys for Plaintiffs in Error

ROOTHMAN & RODENFELD LAW FIRM, CHICAGO, ILL.

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# United States Supreme Court.

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H. H. Bohning, Plaintiff in Error, vs. The State of Ohio, Defendant in Error.	}	[No. 561.]
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Emil Pohl, Plaintiff in Error, vs. The State of Ohio, Defendant in Error.	}	[No. 562.]
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## BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

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### STATEMENT OF FACTS.

The plaintiffs in error were convicted and sentenced to pay a fine of \$25.00 each, in the mayor's court of the village of Garfield Heights, Cuyahoga county, Ohio, Pohl having been a teacher and Bohning a member of the board of trustees of a certain parochial school, known as St. John's Evangelical Congregational School, in said village, it appearing that Pohl did, in said school, on the

eighth day of September, 1919, impart instruction in and did teach the German language to pupils in said parochial school who had not completed a course of study equivalent to that prescribed in the first seven grades of the elementary schools of the State of Ohio, and that Bohning, as a member of said board of trustees, did cause said Pohl to impart instruction and teach, as aforesaid, contrary to the provisions of what is known as the "Ake Law."

It was stipulated in an agreed statement of facts upon the trial that:

"Said parochial school is maintained by the voluntary contributions of the pupils and their parents, and others interested in the educational purposes of the Evangelical Lutheran Church, but that said school is free, open and available to all persons, without discrimination or distinction, creed, condition, race or otherwise.

"That the said Saint John's Evangelical Lutheran Congregational School, being a parochial and private school, does not receive any part of the public school funds of the State of Ohio."

The convictions were affirmed in the Common Pleas Court, the Court of Appeals and the Supreme Court of Ohio, in which courts proceedings in error were successfully prosecuted.

The following is a copy of the statute in question, commonly known, from the name of its author, as the "Ake Law." (108 Ohio Laws, 614.)

"An act to supplement section 7762 of the General Code, by the addition of supplemental sections to be known as sections 7762-1, 7762-2, 7762-3 and

7762-4, and to repeal section 7729, concerning elementary, private and parochial schools and providing that instruction shall be in the English language.

**"Be it enacted by the General Assembly of the State of Ohio:**

**"Section 1.** That section 7762 be supplemented by sections 7762-1, 7762-2, 7762-3 and 7762-4 to read as follows:

**"Sec. 7762-1.** That all subjects and branches taught in the elementary schools of the state of Ohio below the eighth grade shall be taught in the English language only. The board of education, trustees, directors and such other officers as may be in control, shall cause to be taught in the elementary schools all the branches named in section 7648 of the General Code. Provided, that the German language shall not be taught below the eighth grade in any of the elementary schools of this state.

**"Sec. 7762-2.** All private and parochial schools and all schools maintained in connection with benevolent and correctional institutions within this state, which instruct pupils who have not completed a course of study equivalent to that prescribed for the first seven grades of the elementary schools of this state, shall be taught in the English language only, and the person or persons, trustees or officers in control shall cause to be taught in them such branches of learning as prescribed in section 7648 of the General Code, or such as the advancement of pupils may require, and the persons or officers in control direct; provided that the German language shall not be taught below the eighth grade in any such schools within this state.

**"Sec. 7762-3.** Any person or persons violating the provisions of this act shall be guilty of a misdemeanor and shall be fined in any sum not less than twenty-five dollars nor more than one hundred dol-

lars, and each separate day in which such act shall be violated shall constitute a separate offense.

“Sec. 7762-4. In case any section or sections of this act shall be held to be unconstitutional by the supreme court of Ohio, such decision shall not affect the validity of the remaining sections.

“Section 2. That section 7729 of the General Code be and the same is hereby repealed.”

Passed May 8, 1919.

Approved June 5, 1919.

### ARGUMENT.

The only question in the case is whether or not Sections 7762-2 and 7762-3 of the act are in contravention of that portion of the Fourteenth Amendment to the Constitution of the United States, which provides:

“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

It is the contention of the plaintiffs in error that Sections 7762-2 and 7762-3 of the act in question are in contravention of the Fourteenth Amendment in that:

1. They abridge their privileges and immunities as citizens of the United States.
2. They deprive them of liberty without due process of law.
3. They deny to them the equal protection of the laws.

It is, of course, well settled that the Fourteenth Amendment does not limit the subjects upon which the police power of a state may lawfully be exerted.

Upon that proposition, Chief Justice Fuller, in the case of **Giozza vs. Tierman**, 148 U. S., 657, 662, said:

“It was not designed to interfere with the power of the state to protect the lives, liberty and property of its citizens, and to promote their health, morals, education and good order.”

But, in the exercise of the police power, the constitutional guaranties may not be ruthlessly and arbitrarily stricken down and overridden. To disregard them the public necessity must be imperative.

Speaking of the police power, Mr. Justice McKenna, in the case of **Eubank vs. City of Richmond**, 226 U. S., 137, 143, observed:

“But necessarily it has its limits and must stop when it encounters the prohibitions of the constitution.”

Discussing the police power in connection with the constitutional guaranties, the noted Judge Christiancy, in the case of **People vs. Jackson & Michigan Plank Road Co.**, 9 Mich., 285, 307, said:

“Powers, the exercise of which can only be justified on this specific ground, and which would otherwise be clearly prohibited by the constitution, can be such only as are so clearly necessary to the safety, comfort or well being of society, or so imperatively required by the public necessity, as to lead to the rational and satisfactory conclusion that the framers of the constitution could not, as men of ordinary prudence and foresight, have intended to prohibit their exercise in the particular case notwithstanding the language of the prohibition would otherwise include it.”

We assume that it will not seriously be denied that the letter of Section 7762-2 of the “Ake Law” contravenes the inhibitions of the Fourteenth Amendment relating to liberty, equality and privilege, and that it will be claimed, as it was below, that the same was passed by the General Assembly in pursuance of a proper exercise

of the police power in the interest of the public welfare, under circumstances which at the time justified and still continues to justify the manifest disregard of constitutional guaranties, safeguards and inhibitions.

The section, fairly construed, by the use of the phrase, "or such as the advancement of pupils may require," means that the persons and officials in control of a private parochial school may, in their discretion, permit and direct the teaching of any foreign language to pupils therein who have not completed a course of study equivalent to that prescribed (Section 7648, General Code) for the first seven grades of the elementary schools of the state, excepting always the German language, the teaching of which is prohibited.

It was the conception of the court below (*Pohl vs. The State of Ohio*, 102 Ohio St., 474, 477), that the discretion of the legislative body of the state to declare acts and things *malum prohibitum* which were not, before the enactment, inherently wrongful or immoral, is beyond review by the courts for, in its *per curiam* opinion it declares that "it is not within the province of a court to re-determine the existence or non-existence of such facts," referring to facts which, in the opinion of the legislative body "justified it in concluding that the common welfare required" the enactment.

If such be the law, we have at last arrived at the construction so long contended for by the extreme socialists that the constitutional guaranties of life, liberty and property are mere governmental promises to be regarded and kept or not as the legislative branch may conclusively determine.

But we have not yet reached that point in the processes of evolution supposed to be going on in constitutional conception and construction. The ultimate power of the courts to inquire into and determine the existence of the necessity for the exercise of the police power still lives. They still, independently of the legislative branch, have a judgment of their own.

It was held in the case of **Eubank vs. City of Richmond**, 226 U. S., 137:

“While the police power of the state extends not only to regulations promoting public health, morals and safety, but also to those promoting public convenience and general prosperity, it has its limits and must stop when it encounters the prohibitions of the Federal Constitution.”

It was said by Mr. Justice Brown in the case of **Lawton vs. Steele**, 152 U. S., 133, 137:

“The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police power is not final or conclusive, but is subject to the supervision of the courts.”

It was well said by Judge Davis, in the case of **State vs. Boone**, 84 Ohio St., 346, 351:

“While, therefore a broad discretion is given to the legislature to provide for the general welfare, it necessarily is not an arbitrary or unlimited discretion; for if it were beyond judicial control or review it would amount to a practical abrogation of all constitutional guaranties of personal rights and the undefined boundaries of legislative power

could be extended so as to authorize the worst and most irresponsible form of despotism, a legislative despotism conducted in the name of the people. Hence it has been held, not only in this state, but in a great number of cases both in the federal and state courts, that it is within the judicial power to declare void an unnecessary or unreasonable exercise of police power."

Mr. Justice Peckham, in the case of **Lochner vs. New York**, 198 U. S., 45, 56, said:

"It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty."

Speaking of the police power, Mr. Justice Day, in the case of **Buchanan vs. Warley**, 245 U. S., 60, 74, said:

"The exercise of this power, embracing nearly all legislation of a local character, is not to be in-

terfered with by the courts where it is within the scope of legislative authority and the means adopted reasonably tend to accomplish a lawful purpose. But it is equally well established that the police power cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution."

The rule was thus defined by this court in the case of **Rast vs. Van Deman**, 240 U. S., 343:

"The recognized rule that legislative opinion may not impose judicial opinion as to what are fundamental rights, does not determine supremacy in any given instance; but the power of the legislature to regulate conduct and contracts upon its conception of the public welfare is only subject to review by the courts when the legislation is **unreasonable or purely arbitrary.**"

The legislative branch, then, is not the sole judge of the reality of the public necessity which justifies its action in the exercise of the police power. In the last analysis, the courts are the final arbiters of that necessity which must form the predicate of the deprivation of the solemn rights of citizens guaranteed by the primordial law of the land, violation of which, by the states, are inhibited by the Fourteenth Amendment. That Amendment was intended to prevent arbitrary, undue, unjust and capricious interference or deprivation of those personal rights. The test of a police regulation, measured by the Amendment is reasonableness, as contradistinguished from arbitrary or capricious action.

Proceeding to test Sections 7762-2 and 7762-3 of the act in question by the established rule, the inquiry arises:

Was the public necessity upon which it was based real, or was it assumed and pretended? Did it actually exist?

That public necessity, from the legislative viewpoint, may best be stated by reference to the following excerpts from the message of Governor James M. Cox to the General Assembly urging a change in the pending bill, which, as it stood, applied only to the public schools. Vol. 108, Ohio Senate Journal (1919), page 1238.

"I am thoroughly convinced that the action of the House was taken through an entire misconception as to the meaning of the bill. First of all, it carries a very practical objection in that it will interfere with established routine in the junior high schools which are considered part of the grades. But it is not this phase of the matter which prompts my addressing your honorable body.

"The language employed, the closer it is analyzed, is artful, insidious, and apparently deliberate in its attempt to deceive the people of the state. Stripped of its verbiage, it means this: That only a part of the children of Ohio, during the impressionable years, when they pass through the elementary grades, are protected from the possibility of poison from German virus. The private and parochial schools of this state have not asked the preference which this bill provides, and they would in due season, resent the implication which it carries. We do not want a preserve of treason anywhere in Ohio, and to create one through legislative act would be a reproach against the fair name of this state.

"It is not necessary for me to elaborate on the resolute, composite thought of our people. We have paid bitterly for delinquencies in the past, and the first precaution that suggests itself to the patriotic mind with the early days of peace, is to destroy every agency of German propaganda, and see to it that none can be created in the future.

"This bill presumably is based upon the idea that the teaching of German to the tender youth of the state is a menace to the ideals of this Republic, and yet it protects only the children in the public schools. It would be unwarranted and even wicked presumption that children in private and parochial schools are not American. They are part of our younger generation, deserving of every guarantee and safety which the common schools provide. The naked truth is that the ingenious phrase of this bill springs from disloyalty somewhere. Someone seeks to create a sheltered spot where treason can grow under cover of the law.

"Those in whom this disloyal interest is centered, would form but a mere infinitesimal part of the private and parochial schools, but their entrance would be under circumstances unworthy of the very institutions which their sponsors ostensibly honor. We have only to cast an eye and ear to what is going on in other states to be thoroughly convinced that the Prussian spirit of intrigue is not dead in America, and it must be more than a mere coincidence that the attempt elsewhere is made through statutory phrase much, if not quite the same as that contained in the measure under discussion.

"I counsel with you through this message, rather than await the exercise of the veto privilege, because I am convinced that upon reflection you will not want the history of these reconstruction days to carry the record of a legislative enactment based upon treason and passed through deception. I am sure that in the final analysis both the legislative and executive thought of this state is agreed that neither our people, nor our governmental agencies, will be trifled with.

"If any person in Ohio wants his child indoctrinated with Prussian creed, let our safeguards be such that he must go elsewhere for it."

The bill, in accordance with the message, was so amended as to include private and parochial schools, and passed in that form. It went into effect on the fifth day of September, 1919. The last gun in the great World War had been fired almost ten months before, the armistice with Germany having been signed on the 11th day of November, 1918. On the same date the President delivered a message to Congress in which, after reading the full terms of the armistice, he said:

“The war thus comes to an end; for having accepted these terms of armistice, it will be impossible for the German command to renew it.”

A little further he said:

“We know only that this tragical war \* \* \* is at an end.”

Hence it cannot be claimed that the legislation in question was necessary as a war measure. Indeed, so far as the United States was concerned, the war itself was waged not so much against the German people as against the Imperial German Government. Such was the declaration of Congress in the joint resolution passed April 6, 1917, in which it was said:

“That the state of war between the United States and the Imperial German Government which has thus been thrust upon the United States is hereby formally declared.”

In his address requesting the adoption of the resolution, the President said:

“We have no quarrel with the German people. We have no feeling toward them but one of sympathy

and friendship. It was not upon their impulse that the government acted in entering the war. It was not with their previous knowledge and approval. . . . We are, let me say again, the sincere friends of the German people, and shall desire nothing so much as the early re-establishment of intimate relations of mutual advantage between us."

So that the "Ake Law" must rest, not upon the extraordinary powers recognized to exist in every government during actual and existing conditions of war, but upon the naked police power, the exercise of which becomes necessary for the public safeguard and welfare, in time of peace.

The predicate that there was a "poison virus" in the German language and that a private or parochial school in which that language was taught was a "preserve of treason" was without the slightest foundation in fact. That there was a public necessity for the extirpation of all knowledge of the German language, by prohibiting the teaching thereof, in order "to destroy every agency of German propaganda" was an assumption that lacked every element of truth and common sense. The best that can be said of the act is that it was a strained reflex of war phobia, passed after the war was over. If hate is justified in the vortex of war, public necessity does not demand that it find expression in the form of a statutory enactment after the event.

If there was a further assumption that residents of Ohio, of German nativity and descent, were extensively members of Red organizations, advocating Bolshevist theories and doctrines, hostile to our institutions, and that

the extirpation of the German language would tend to repress and disrupt such organizations, that also lacks the element of truth. Those organizations are composed of foreign constituents of recent immigration, of which the German people in this country form no part and with which they have neither racial affiliation nor doctrinal sympathy. The fact is that immigration of persons having Germany as the country of their origin, during the past twenty years, has been slight indeed, when compared with that from other countries. From 1900 to 1910, the German immigration was but 3.9 per cent. of the whole immigration to this country. From 1910 to 1919, it was 2.7 per cent. During the same period the immigration from Russia was five times as great. That from Italy was greater still, and that from Austria-Hungary, chiefly Hungarians, was the largest of all. The total German immigration to this country since 1899 has been 484,422, of which it is not likely that as many as 5000 form a part of the six millions of Ohio's population. From 1850 to 1890, our immigration was chiefly, and in almost equal parts, from the United Kingdom of England and from Germany. In the decade from 1850 to 1860 the German immigration was 36.6 per cent. of the whole. From 1860 to 1870 it was 34 per cent. From 1870 to 1880 it was 25 per cent. From 1880 to 1890 it was 27.7 per cent. From 1890 to 1900 it was 14 per cent. Thereafter, as we have seen, it fell off very rapidly, until, after 1900 it was less than 3 per cent. of the total immigration. The remarkable decrease in the proportion of immigrants from Northwestern Europe and a striking

increase in the proportion from Southern and Eastern Europe form conspicuous features of immigration statistics of recent years. For the decade between the taking of the censuses of 1900 and 1910, the total immigration was about 8,500,000. Of this total, about 6,800,000, or 72 per cent. was from Southern and Eastern Europe, and about 1,800,000, or 21 per cent., from Northwestern Europe. In the 100 years since our country began to keep records of immigration, 5,500,000 Germans, leaving the country of their nativity, came to the United States and made permanent homes therein and became citizens thereof. These statistics show that the great preponderance of foreign element which has come to our shores in the past generation was from Eastern and Southern Europe. It is this horde from which the Reds are recruited. From its ranks come the agitator and conspirator, fomenting and preaching doctrines inimical and dangerous to our institutions, and yet, so far as the legislation under consideration is concerned, any of its numerous languages may be freely taught in any grade of the private and parochial schools of Ohio, without possibility of molestation.

The teaching of the German language in Ohio, for a great many years, has taken place principally in the parochial schools of the Evangelical Lutheran Church. Such teaching has been very largely for religious purposes. The members of that Church have desired that the religion of Martin Luther should be taught to their children in Luther's language. For that purpose a knowledge of that language is indispensable. There are no Lu-

theran parochial schools in which the elementary branches are not taught in the English language. In many of them an English course of religious instruction has been added. Hundreds of the Lutheran parochial schools are now wholly English. Eventually, doubtless, all will become so. That is the trend. It is advocated by the leading Lutheran publications. To assume, for legislative purposes, that any of these schools is a "preserve of treason" is a libel upon their entire history. Charles McKenney, president of the Michigan State Normal College, recently said:

"There is no more loyal group of men in America than those who come from parochial schools. One-fourth of all the men in the late world war who fought for America came from parochial and private schools."

There is nothing new in that part of the "Ake Law" which requires the teaching of the common branches in the elementary schools in the English language. That has been the statutory policy of the State of Ohio for more than fifty years, as will appear from an examination of Section 7729 of the General Code, which is repealed by the act in question. That policy deserves the commendation of every citizen and should be, and no doubt will be, rigorously adhered to. For many years after the formation of the state, it was the legislative policy to confide to the boards of education the authority to prescribe the branches to be taught in the schools. Gradually, however, that policy was departed from, and, as the public school system developed, prescribed grades and courses

were provided for by legislation. With respect to the elementary schools, we now have Section 7648 of the General Code, which is referred to in the "Ake Law," and which is as follows:

"Sec. 7648. An elementary school is one in which instruction and training are given in spelling, writing, arithmetic, English language, English grammar and composition, geography, history of the United States, including civil government, physiology and hygiene. Nothing herein shall abridge the power of boards of education to cause instruction and training to be given in vocal music, drawing, elementary algebra, the elements of agriculture and other branches which they deem advisable for the best interests of the schools under their charge."

There is nothing in this section, except as modified by the "Ake Law," which prevents the teaching of any foreign language in the elementary schools, under the authority to teach "other branches." And such might very advantageously be done, for it is only during the impressional years of early childhood that a foreign language can be successfully acquired. A child may learn two or three languages as readily as one. When it approaches maturity, such knowledge is difficult and almost impossible of acquisition.

It is declared in Section 7 of the Ohio Bill of Rights that "knowledge" is "essential to good government," and it is, in that section, ordained that:

"it shall be the duty of the general assembly to pass suitable laws \* \* \* to encourage schools and the means of instruction."

This injunction, it will be noted, was not confined to the system of public common schools contemplated in other provisions (Sections 2 and 3 of Article VI) of the state constitution, but was a broad mandate for the encouragement of the acquisition of "knowledge."

Under these provisions of the state constitution, it is left largely to the legislative discretion to determine what laws are "suitable" to "encourage schools and the means of instruction," but subject always to the limitations upon legislative power to be found in other parts of the state instrument and in the Federal Constitution. The power may go, as it has, to the extent of requiring and enforcing attendance at school during specified ages, with opportunity of acquiring knowledge in designated branches of learning. To restrict the opportunity of becoming familiar with any branch of human learning, including foreign languages, is not to "encourage the means of instruction."

### Liberty.

Our state and federal constitutions created no personal rights. They safeguard and guarantee rights inherent in the individual from his creation. Man existed before governments, with all the essential and inalienable rights incident to his existence. It is not for the state to encroach upon or destroy them. Its mission is to protect and safeguard them. One of those inalienable rights is to acquire knowledge, and that includes a knowledge of foreign languages. Such knowledge has always been regarded as a legitimate, if not a necessary branch of edu-

cation. The right to teach and to learn a foreign language is an attribute of liberty.

It was said by Mr. Justice Harlan, in his dissenting opinion in the case of **Berea College vs. Kentucky**, 211 U. S., 45, 67:

"The capacity to impart instruction to others is given by the Almighty for beneficent purposes and its use may not be forbidden or interfered with by Government—certainly not unless such instruction is, in its nature, harmful to the public morals or imperils the public safety. The right to impart instruction, harmless in itself and beneficial to those who receive it, is a substantial right of property—especially when the services are rendered for compensation. But even if such right be not strictly a property right, it is, beyond question, part of one's liberty as guaranteed against hostile state action by the Constitution of the United States."

Goethe said:

"A man who is ignorant of foreign languages is ignorant of his own."

Lord Macauley observed:

"Charles V said that a man who knew four languages was worth four men."

In the dawning nationalization of the world, a knowledge of the leading languages of mankind must be of ever growing importance and a necessary part of the education of our youth. National Commissioner of Education Claxton said, March 12, 1918:

"For practical, industrial and commercial purposes, we shall need a knowledge of the German language more than we have needed it in the past.

The fact that we are at war with Germany should not, I believe, affect in any way our policies in regard to the teaching of the German language in our schools."

Knowledge, upon which the fabric of our institutions are declared to rest, is a broad term.

"The sure foundations of the state are laid in knowledge, not in ignorance; and every sneer at education, at culture, at book learning, which is the recorded wisdom of the experience of mankind, is the demagogue's sneer at intelligent liberty, inviting national degeneracy and ruin."

**George Ticknor Curtis.**

There is nothing in the German language, as a language, inherently improper or immoral. It is one of the great languages of mankind and its literature is not surpassed by any other. To arbitrarily deprive a citizen of the United States of the right to acquire a knowledge of it, or from teaching it, through the medium of a criminal prosecution based upon a penal statute prohibiting it, is to deprive him of liberty without due process of law. The subject matter is such that it cannot be made the predicate of a criminal statute. Legislative fiat cannot transform into a crime an act or thing which in its nature is entirely innocent and proper.

The right to teach knowledge in all its branches, as an avocation, is fundamental and inalienable.

It was said by Mr. Justice Bradley, in the case of **Butchers Union Company vs. Crescent City Company**, 111 U. S., 746, 762:

"The right to follow any of the common occupations of life is an alienable right. It was formu-

lated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness' \* \* \* I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States. \* \* \* But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty, for it takes from him the freedom of adopting and following the pursuit which he prefers, which, as already mentioned, is a material part of the liberty of the citizen."

The "liberty" safeguarded by the Fourteenth Amendment is not mere freedom from physical incarceration. It embraces in its broad scope the license to exercise, except when the public welfare imperatively demands its curtailment, all the natural rights incident to existence in a civilized country.

In the case of **Allgeyer vs. Louisiana**, 165 U. S., 578, 589, Mr. Justice Peckham, speaking of the Fourteenth Amendment, said:

"The liberty mentioned in that Amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all con-

tracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

Speaking of the solicitude of this court with respect to the constitutional guaranties relating to personal liberty, and particularly of the Fourth and Fifth Amendments to the Federal Constitution, Mr. Justice Clark, in the case of **Gouled vs. United States**, 255 U. S., 298, 303, said:

"It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in **Boyd vs. United States**, 116 U. S. 616, in **Weeks vs. United States**, 232 U. S. 383, and **Silverthorne Lumber Co. vs. United States**, 251 U. S., 385) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two Amendments (Fourth and Fifth). The effect of the decisions cited is: that such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty and private property;' they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as imperative as are the guaranties of the other fundamental rights of the individual citizen—the right to trial by jury, to the writ of **habeas corpus** and to due process of law. It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well intentioned but mistakenly overzealous executive officers."

There can be no liberty in a state where its laws make it a crime for citizens of the United States to teach or to be taught a foreign language. There can be no liberty to

a parent, in such a state, under such a law, who may desire to have imparted to his child, in a private or parochial school, a knowledge of a foreign language. There is no more "treason" in a language, as such, than there is in a phonograph.

### Equality.

The constitutional guaranty of equality is not second in importance to that of liberty. The principle of equality of right and opportunity is the very cornerstone of our institutions. It was the first note in the bugle call of the Declaration of Independence. It is in itself an attribute of liberty. The Fourteenth Amendment safeguard of the equal protection of the laws is a pledge of the protection of equal laws.

Mr. Justice Strong, speaking for the court, in the case of **Strauder vs. West Virginia**, 100 U. S., 303, 310, said:

"The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty or property."

The objection in the court below that the act in question lacked the essential constitutional element of equality was dismissed with the gesture that:

"The legislation in question is of equal application to every pupil of the state who has not completed a course of study equivalent to that prescribed

in the first seven grades of the elementary schools, regardless of nationality, ancestry, or place of birth, and is, therefore, of equal operation upon every person within the designated grade."

Classification has not infrequently been the cloak under which was hidden arbitrary invasion and violation of the constitutional guaranties of equality. The class referred to by the court was not the class or classes which the act created, which it was claimed rendered it nugatory. It created a class of those who followed the avocation of teaching the German language, and prohibited them from teaching the same in the private and parochial schools of the state to pupils below the eighth grade, while it permitted teachers of any other foreign language to teach the same to such pupils. It segregated into a class such pupils who might desire to acquire a knowledge of the German language, while other such pupils, who might desire it, could be taught and might acquire a knowledge of any other foreign language. It isolated into a class the parents of all such pupils in such schools, who might desire to have imparted to their children a knowledge of the German language.

These classes, so segregated and isolated, are arbitrary, artificial, capricious and unreasonable. They are not germane to the subject matter of teaching and acquiring knowledge. They are clear and hostile discriminations against particular persons and classes, of a character unusual to the practices of our governments. The act has no attribute of equality of operation.

It is not to be questioned that the state may distinguish,

select and classify objects of legislation, but such legislation must not only operate equally upon all within the class but the classification must furnish a reason for and justify its creation. The reason must inhere in the subject matter and rest upon some basis which is natural, germane and substantial. The classification attempted in the act in question, if it can be called such, was mere isolation and arbitrary selection. There is no fair reason for the exclusion of the teaching of the German language in the grades of the schools in question that would not require, with equal force, the extension of the exclusion to all other foreign languages.

### Privilege.

The right to pursue the avocation of a teacher of a foreign language is a privilege. The right to acquire a knowledge of a foreign language is a privilege. The right of a parent to have his child taught a foreign language is a privilege. All of these particular and peculiar advantages fall under the constitutional guaranties of liberty. They are destroyed by the act in question. The Fourteenth Amendment throws its broad mantle of protection over them by inhibiting the states from passing or enforcing any law which shall abridge them.

"Privilege" is defined to be:

"The enjoyment of some desirable right.

"A private or peculiar favor enjoyed.

"A peculiar advantage."

Cent. Dict.

### **Due Process of Law.**

The "due process of law" safeguarded by the Fourteenth Amendment means not only the right of hearing before a competent tribunal, but freedom from arbitrary and unreasonable legislative acts. Such acts are not cured, so far as due process is concerned, because they contemplate or provide for a trial or prosecution in a court. "Due process of law," as applied to a criminal prosecution, cannot mean less than that the accusation is based upon a valid and constitutional law. Jurisdiction of the court or tribunal to hear and determine the case is an essential element of due process. There can be no jurisdiction where the prosecution rests upon a void and unconstitutional law.

### **Similar Acts in States Other Than Ohio.**

About the time of the adoption of the Ohio enactment here involved, statutes somewhat similar were adopted in two or three other states. The constitutionality of those adopted in Iowa and Nebraska were passed upon in the Supreme Courts of those states.

The following is a copy of the Iowa act:

"Section 1. That the medium of instruction in all secular subjects taught in all of the schools, public and private, within the state of Iowa, shall be the English language, and the use of any language other hereby prohibited; provided, however, that nothing herein shall prohibit the teaching and studying of foreign languages as a part of the regular school course \* \* \* above the eighth grade."

There was a penal section for violation of Section 1.

The Supreme Court of the state, in the case of **State of Iowa vs. Bartels**, 191 Iowa, 1060, held:

“The teaching of ‘reading’ in a parochial school to pupils under the eighth grade by means of books on secular subjects in the German language is violative of Ch. 198, Acts 38th G. A., even though the purpose of such teaching is to qualify such children, in accordance with the beliefs of the church, (1) to read and understand the German catechism and bible, in order to become communicants of the church, and (2) to participate intelligently in the home with their parents in religious worship and instruction in the German language, and even though all common school branches, **including reading**, are also taught in English in said school.

“Evans, C. J., Weaver and Preston, JJ., dissent, holding that, under the stipulated record, the teaching in question was for a religious purpose—was not secular.

“The prohibition against teaching in other than the English language of secular subjects in public and private schools in named grades is not subject to the vice (1) of violating inalienable rights (2) of prohibiting the free exercise of religion, (3) of constituting class legislation; or (4) of abridging the privileges or immunities of citizens of the United States.

“Evans, C. J., Weaver and Preston, JJ., dissent as to clause 2, holding that, under the particular record of this case, the instruction in question was non-secular.”

The Nebraska act provided:

“Section 1. No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any other language than the English language.

"Section 2. Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade, as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides."

There was a penal section, providing for fine or imprisonment for violation of the act.

The Supreme Court of the state, in the case of **Nebraska District of Evangelical Lutheran Synod vs. McKelvie**, 104 Neb., 93, construed the act not to prohibit the teaching of a foreign language in the elementary schools, in addition to the regular course of study in the English language and outside of regular school hours during the required period of instruction, so as not to interfere with the elementary education required by law. The court further held:

"7. If the law should be construed to mean that parents or private tutors might teach a foreign language, but that others could not employ teachers to give instruction in a class or school, it would be an invasion of personal liberty, discriminative and void, there being no reasonable basis of classification."

There is in this country a constant and growing endeavor, encroaching more and more upon the domain of individual liberty, to establish as a fundamental that an American citizen possesses such rights only as a legislative majority permits. This theory may be well enough in a country whose constitution is implied in its institutions and customs, and where the popular interpretation of the constitution overrides the juristic interpretation.

It has no place with us, where life, liberty, equality and property are guaranteed and safeguarded in the written primordial law.

Respectfully submitted,

TIMOTHY S. HOGAN and

FRANK DAVIS, JR.,

Attorneys for Plaintiffs in Error.

# In the Supreme Court of the United States

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H. H. BOHNING,

*Plaintiff in Error,*

vs.

THE STATE OF OHIO,

*Defendant in Error.*

No. 561

EMIL POHL,

*Plaintiff in Error,*

vs.

THE STATE OF OHIO,

*Defendant in Error.*

No. 562

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## BRIEF ON BEHALF OF DEFENDANT IN ERROR.

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### STATEMENT OF FACTS.

Section 7762-1 of the General Code of Ohio applies to and seeks to control the course of study in the elementary branches of the public schools of Ohio in the following language:

“That all subjects and branches taught in the elementary schools of the state of Ohio below the eighth grade shall be taught in the English language only. The board of education, trustees, directors and such other officers as may be in control, shall cause to be taught in the elementary schools all the branches named in Section 7648 of the General Code.

Provided, that the German language shall not be taught below the eighth grade in any of the elementary schools of this state."

Section 7762-2 provides for the same control of the course of study in schools connected with benevolent and correctional institutions and also to private and parochial schools in the following language:

"All private and parochial schools and all schools maintained in connection with benevolent and correctional institutions within this state which instruct pupils who have not completed a course of study equivalent to that prescribed for the first seven grades of the elementary schools of this state, shall be taught in the English language only, and the person or persons, trustees or officers in control shall cause to be taught in them such branches of learning as prescribed in section 7648 of the General Code or such as the advancement of pupils may require, and the persons or officers in control direct; provided that the German language shall not be taught below the eighth grade in any such schools within this state."

Section 7648 of the General Code of Ohio mentioned in these two sections defines elementary schools as follows:

"An elementary school is one in which instruction and training are given in spelling, reading, writing, arithmetic, English language, English grammar and composition, geography, history of the United States, including civil government, physiology and hygiene. Nothing herein shall abridge the power of boards of education to cause instruction and training to be given in vocal music, drawing, elementary algebra, the elements of agriculture and other branches which they deem advisable for the best interests of the schools under their charge."

Section 7649 of the General Code of Ohio defines High School as follows:

“A high school is one of higher grade than an elementary school, in which instruction and training are given in approved courses in the history of the United States and other countries; composition, rhetoric, English and American literature; algebra and geometry; natural science, political or mental science, ancient or modern foreign languages, or both, commercial and industrial branches, or such of the branches named as the length of its curriculum makes possible. Also such other branches of higher grade than those to be taught in the elementary schools, with such advanced studies and advanced reviews of the common branches as the board of education directs.”

and Section 7651 defines what shall constitute a college.

Section 7744 of the General Code fixes the number of weeks which shall constitute a school year for elementary schools at not less than thirty-two nor more than forty weeks.

Section 7645 of the General Code provides that Boards of Education are required to prescribe a graded study for all schools under their control in the branches named in Section 7648 General Code.

## ARGUMENT.

All the foregoing laws have for their object the regulations known as compulsory education. Such laws have always been held to be not only a proper exercise of police power, but also a very necessary part in the fundamental institutions of our country, having for its object the welfare of society and the upbuilding of an intelligent citizenship.

We find then that the legislature has the right, more than that, the duty of providing adequate means of education of the young.

It surely has the right to prescribe the course of study which shall be taught. In Section 7648 of the Code the legislature has named the subjects which shall be taught in and which shall constitute a school an elementary school.

Having defined what shall be taught, and clearly having the right to so define, has not the legislature a correlative right to say what shall not be taught and the language in which the teachings shall be conducted.

Experience has shown that it is not wise to keep a young child or one that would be a student in the elementary branches in attendance on school more than forty weeks out of fifty-two. It has also demonstrated that it requires at least thirty weeks in any one year to impart the knowledge necessary in certain essential studies.

The legislature of Ohio has therefor enacted laws fixing the maximum and minimum length of attendance in elementary schools in any year, and prior to the enactment of the legislation complained of herein had attempted only to say what branches of knowledge should be taught.

Let us imagine, for example, that out of thirty weeks which a board of education fixed as a school year of an elementary school, it would provide that ten weeks of this term should be devoted to the subjects mentioned in Section 7648 G. C. and the remaining twenty weeks to the teaching of dancing or the Hebrew language or the German language or other foreign language, can it be that such a course would be carrying out the spirit of a compulsory educational law or the laws as laid down by the Ohio Legislature? Would not such a course be directly contrary to the purposes of such laws?

Sections 7762-1 and 7762-2 of the General Code are elements of the compulsory educational law, and so far as their natural effect would be operates to the extent that they prohibit spending any of the time deemed essential to acquiring knowledge in the branches which are affirmatively prescribed by teaching a language not deemed essential to good intelligent citizenship in the State of Ohio.

Section 7762-2 General Code applies this same rule to private, institutional and parochial schools. It is as essential that pupils in these schools should receive standard educational facilities as those who attend the public schools. The objective, intelligent citizenship, is the same and it cannot be said that because a child attends a private school or a parochial school that the standard of its educational requirement should be any less than is required of a pupil in the public schools.

The only remaining question is that Section 7762-2 provides that the teaching shall be conducted in the English language only. We think that this is clearly within the right of a legislature in an English speaking country; to say otherwise would create conditions chaotic in the extreme, with results that are unthinkable.

Much is said in the brief of plaintiffs in error about personal rights, liberty, equality, privilege, due process of law, poison virus, etc. These questions are not involved in the law complained of. The first duty of society to itself is to see to it that the elements which compose society have the essentials of good citizenship. This is paramount to any whim or notion that any person or set of persons may have. No religious liberties are interfered with by the act in question; if a parent wishes his child taught Martin Luther's dogma in Martin Luther's language, there is no law against the child being taught that language, unless it takes so much of the child's time and health as to endanger society in that regard, nor does the act complained of interfere with any substantial right under the Constitution. It does not interfere with religious liberty, nor does it abridge any privilege or immunity, nor deprive any person of life, liberty or property, nor does it deny to any person equal protection of the laws. It is a reasonable regulation, having for its objective the highest purpose of government, the upbuilding of an intelligent citizenship, or as said by Chief Justice Fuller in the case of *Giozza vs. Tierman*, 148 U. S. 657-662, it tends to promote "their health, morals, education and good order."

A large portion of plaintiffs in error's argument is addressed to the proposition that the act in question is inadvisable and inexpedient. With this proposition we, as counsel, and the Court have nothing to do; the legislature is the sole judge of the expediency and advisability of its legislative acts, and it is only when they clearly are violative of constitutional rights that they may be declared void.

In this connection we may remember that the then German Emperor at one time made a boast that the

United States could not engage in war with his country because of the large number of his countrymen residing in the United States, and that by the continued teaching of the language of his country in the schools, and the consequential partiality which this fact would engender in the minds of descendants of people who were of his nation and who resided in the United States, would prevent any active participation by this country in the war. He was mistaken, but there was some logic in his line of thought, and it certainly is within the province of the legislature to enact laws which would effectually make this condition improbable and to prevent the possibility of any such condition being true.

On this point we respectfully refer to the reasoning of the Supreme Court of Ohio in this present case and desire that the language therein contained be deemed to be a part of our argument.

*Pohl vs. State of Ohio*, 102 Ohio State Reports,  
474-477.

Respectfully submitted,

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